

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ERIN GEE,

Plaintiff,

v.

17 CV 4689 (ALC) (SN)

CBS BROADCASTING INC., et al.,

Defendants.

New York, N.Y.
January 12, 2018
3:15 p.m.

Before:

HON. SARAH NETBURN,

Magistrate Judge

APPEARANCES

KEVIN TODD MINTZER
Attorney for Plaintiff

MORGAN, LEWIS & BOCKIUS LLP
Attorneys for Defendants
BY: CHELSEA LYNN CONANAN

1 (Case called)

2 THE DEPUTY CLERK: Counsel, please state your
3 appearance for the record.

4 MR. MINTZER: Kevin Mintzer for Plaintiff Erin Gee,
5 your Honor. Good afternoon.

6 MS. CONANAN: Chelsea Conanan for Defendant CBS, your
7 Honor. Good afternoon.

8 THE COURT: Good afternoon.

9 Thank you. We are here on the plaintiff's January 2
10 letter, and I have the defendants' January 9 response. The
11 response suggests that a few of the items on the January 2
12 letter may have been resolved, and because I'm a perpetual
13 optimist, maybe some other issues have been resolved since the
14 January 9 letter.

15 Why don't I give Mr. Mintz an opportunity to tell me
16 where things stand at this point and to focus our attention so
17 we can be as productive as possible today.

18 MR. MINTZER: Your Honor, as I read the January
19 letter, I think that they've basically agreed to provide what
20 we're asking for with respect to all of our requests but one.

21 So I think, as far as I can tell, that's the only
22 request that's still on the table, which is related to document
23 request number 37 pertaining to other complaints of
24 discrimination.

25 Before getting to that, I think it would be useful,

1 since we did go through the exercise of having presented this
2 to the Court, to get the Court's order requiring defendants to
3 comply with what they said they would do in their letter, but I
4 don't read their letter as holding anything back beyond what
5 we've asked for in the request. So I don't know that we need a
6 more in-detail discussion about them.

7 THE COURT: I'll ask Ms. Conanan about when I can
8 expect to get those documents produced. Why don't I hear your
9 position with respect to request 37 which is for formal or
10 informal complaints or charges of gender discrimination or
11 retaliation. I assume it's retaliation for raising gender
12 discrimination issues.

13 MR. MINTZER: Yes, your Honor.

14 THE COURT: Made by any employee in CBS News, and the
15 period is January 1, 2012, to the present.

16 MR. MINTZER: Your Honor, the Second Circuit has long
17 recognized that other complaints of discrimination, other
18 incidents of discrimination, alleged incidents of
19 discrimination, are relevant even in a single-person disparate
20 treatment case to show the defendants' intent and potentially a
21 pattern of behavior. That dates back, as we cite, even going
22 back to the Holland case in 1990.

23 Now, courts since then have focused on three sort of
24 limiting principles that apply to the idea of discovery of
25 those other types of discrimination complaints, and we've tried

1 to be very cognizant of those principles in formulating our
2 request.

3 The first is that generally speaking, I think the
4 cases hold that you get the type of other evidence, other
5 complaints of discrimination that pertain to the type of
6 discrimination that the plaintiff has made, along with
7 obviously in a retaliation case, retaliation claims that go
8 with it so that in this gender discrimination and retaliation
9 case, as your Honor was alluding to already, we've only asked
10 for that, gender discrimination and retaliation claims.

11 We haven't asked for age discrimination claims and
12 other types of discrimination claims. So that's one part of
13 the prong that I think is clear from the case law, and
14 plaintiff's request complies with that.

15 The next part relates to the appropriate timeframe of
16 the request. What we've asked for is a period of five years,
17 which I think, your Honor, is very consistent with the cases
18 that we've cited.

19 There are some cases that provide discovery for
20 periods longer than that, but we've asked for five years. I
21 don't believe there are any cases cited by defendant in which
22 they've suggested that five years is too long. There are a
23 couple of cases which I'll talk about which deny discovery
24 altogether under the circumstances of those cases, but --

25 THE COURT: Can I just interrupt you so I can be

1 reminded of some of the relevant facts. Can you remind me when
2 she started working at CBS News and when you contend, either
3 the first incident of discrimination or the one that's sort of
4 the thrust of the case when she was removed.

5 MR. MINTZER: So Ms. Gee is a long-time employee of
6 CBS News dating back -- I think it's in the complaint -- to the
7 mid 90's, mid to late 90's. She's been there for approximately
8 17 years.

9 The nature of the claims here started when she was
10 passed over for the opportunity to be a substitute director on
11 the CBS Evening News which was the program that she had worked
12 on for a good, long time, many of the years that she had been
13 there.

14 And she was informed of that in late 2014 and then
15 made a complaint about it in early 2015, or I think perhaps she
16 was actually informed about it in early 2015 and then
17 immediately made the complaint within a couple days later.

18 A few weeks after that, she was removed from the
19 broadcast altogether and basically put in no job at all for
20 several months. She literally came to work and did nothing.

21 I don't know if your Honor is familiar with the
22 concept of the rubber room that they have for teachers
23 sometimes when they're on disciplinary charges and not allowed
24 in the classroom. That was the equivalent of what Ms. Gee had
25 for several months.

1 Then after that they finally put her on the CBS
2 Evening News for the weekend edition which was two days of work
3 a week with three days sitting in the rubber room with little
4 blips here and there, and that was pretty much how it went for
5 her for the remainder of her time at CBS which lasted until
6 late 2017. I think it was October 2017 that she resigned to
7 take another position, a full-time position at another network.
8 So that's the background of the timing.

9 So what we've asked for is a period that's basically
10 dating back a couple of years prior to when she alleges she was
11 discriminated and retaliated against and then a couple years
12 into the future for a total of five years, which, as I say, is
13 consistent with the papers, and I haven't seen anything in
14 their papers that take issue with that timeframe.

15 Now, the third prong of the test that the courts have
16 developed for this issue is where we probably have the biggest
17 conflict, and that is the question of whether or not discovery
18 is appropriate on an organizational-wide basis or something
19 less than that.

20 Trying to be conservative about it, the request that
21 we served was not for CBS in general and CBS Broadcasting,
22 which is not the largest corporate entity of CBS, but the
23 broadcasting side would be a larger organization.

24 We haven't asked for that. We've asked just for CBS
25 News, which is a smaller entity. I think they may be formally

1 different companies, but basically CBS News is sort of a
2 division of CBS Broadcasting.

3 THE COURT: Do you have a sense of whether we're
4 talking about 2,000 employees or 20,000 employees?

5 MR. MINTZER: So I was looking, your Honor, at the
6 publicly filed documents with the SEC which have CBS
7 Corporation, which is the big organization, everything, 15,000
8 employees. What your Honor has to understand is that CBS News
9 is a tiny part of that.

10 Now, to answer your question, I don't know how tiny.
11 Perhaps my colleague knows. My estimate would have been that
12 the total employee population of CBS News is maybe between
13 1,000 and 2,000 because CBS Corporation, which has 15,000,
14 according to their publicly filed information -- that includes
15 radio, broadcasting, studios. They make television shows.
16 They have publishing. They have a lot of entities. CBS News
17 is a relatively small part of that larger empire.

18 So I think that that estimate is fair, but it's just
19 an estimate on my part. I don't have the actual information.
20 But if we take that rough estimate, we're looking at
21 potentially, let's say if there are a couple thousand employees
22 at CBS News, presumably if we assume a 50/50 gender ratio,
23 that's maybe 1,000 women.

24 So the question is is it appropriate to get discovery
25 over a five-year period over that population to see what has

1 been going on there, and it is appropriate in this case,
2 your Honor, for several reasons.

3 The cases, I think, recognize that some cases do allow
4 for discovery in a large organization, but I think it's fair to
5 say all of the cases that allow this discovery at all recognize
6 that it's appropriate, at least for the division or the
7 department at issue.

8 My colleague would like to try to slice this finely
9 and say that the relevant department is the program that
10 Ms. Gee has worked on. I think she's throwing in also the
11 morning telecast that she worked on at the very beginning of
12 her career at CBS. But that's not a realistic pool to
13 determine what, if any, culture of allowing discrimination is
14 going on at this network.

15 The population you're talking about for those two
16 programs -- again, I don't have the hard data, but I would
17 estimate that we're talking about maybe 100 or 200 people -- is
18 not anywhere close to that, and they're not even conceding that
19 even discovery of that would be appropriate. They want to
20 limit it further to people who have Ms. Gee's title as an
21 assistant director. There is no case that suggests that that's
22 appropriate.

23 Now, there are cases, including the Rifkinson v. CBS
24 case that they cite, that in the context of trying to get
25 comparative data about employees generally say that you're

1 limited to what is similarly situated, but that's not what
2 we're looking at here.

3 Our request related to similarly situated employees
4 which one of the ones that was resolved, for example, was
5 limited to people in her title and with roughly her job duties
6 and reporting to the same people. But the cases don't suggest
7 that in the context of other complaints of discrimination that
8 a plaintiff is so limited.

9 In fact, Rifkinson -- I did look at the case's
10 subsequent history, including ruling on pretrial motions, and
11 if the Court is inclined to look, there is a pretrial in limine
12 order that came after the decision that defendants rely on in
13 which the court allows plaintiff to introduce evidence of
14 discrimination related to Connie Chung, who, if your Honor may
15 recall, was an anchor at CBS News, and the plaintiff in
16 Rifkinson was just a mid-level manager, basically not talent at
17 all.

18 So that case in no way meant to suggest that the
19 relevant universe of employees that are appropriate to look at
20 for other patterns of discrimination is limited to similarly
21 situated. It does not hold that, and the subsequent history of
22 it shows.

23 The reason why the Court should allow us to have
24 discovery of other complaints of discrimination beyond simply
25 Ms. Gee's supervisors is because plaintiff has the right to

look to see if these senior-level executives that were involved in the decision here -- and they are -- Steve Capus, who is one of the decision-makers, is basically I think the number two person at CBS News. Frank Governale is another senior-level executive.

These are not low-level people who only have influence over their particular domain. These are people who have broad influence in the network, as well as the HR department, who, after plaintiff complained about this, looked into it and basically approved of what CBS did.

All of those folks were involved, and they would be involved presumably if there were other complaints of discrimination throughout the news division, those same people. So we should be permitted to get discovery of that.

Now, the last thing I would say on their proposal cutting it so finely -- and I don't think I fully realized it until I saw their letter -- the way they seem to present this to your Honor is that there is also a per se rule that should be applied that we're not allowed to introduce evidence beyond the individual's supervisor. In other words, if there were not individual complaints against the particular supervisors at issue here, they're not relevant.

The Court should consider the Supreme Court's decision in 2008 of Sprint v. Mendelsohn I think is the hyphenated name of the case, your Honor. I can get you a citation.

1 That case dealt with the potential admissibility of
2 other complaint evidence, which sometimes is called me-too
3 evidence which predated all of the current discussion.

4 That case specifically said that there should not be a
5 per se rule about other complaint evidence for admissibility to
6 say that it's only limited to similarly situated employees.
7 For admissibility, the Supreme Court said that it had to be
8 looked at on a case-by-case basis considering all the factors.

9 So there certainly wouldn't be a basis for discovery
10 purposes, which is obviously a broader pool that we should be
11 looking at, to limit us in that way. So we think that the
12 request that we have made, 37, is appropriately framed. It's
13 consistent with the cases.

14 We think there is more than a good-faith basis,
15 particularly given what's in the public domain now about what's
16 happening at CBS News and the complaints of discrimination that
17 have apparently been made or ignored in other situations.
18 There is more than a good-faith basis for us to pursue this
19 evidence and for the Court to order it.

20 THE COURT: Thank you.

21 Ms. Conanan.

22 MS. CONANAN: Sure. Your Honor, I wanted to address
23 the first issue that you raised. We're in agreement with
24 plaintiff's counsel that all of the issues set forth in his
25 letter to the Court have been resolved except for request

1 number 37, which deals with prior complaints.

2 THE COURT: When will you get your responses to the
3 plaintiff?

4 MS. CONANAN: I think we'll be able to do that by
5 Wednesday of next week, your Honor. Monday is a holiday. So
6 some people are out of the office.

7 THE COURT: Wednesday is fine.

8 MS. CONANAN: Your Honor, we're not suggesting that
9 there is any type of per se rule on the admissibility of this
10 evidence. We're not even at the trial stage yet. So I'm not
11 sure why that's relevant. I want to bring it back to the scope
12 of this case and the particular claims the plaintiff is making
13 in her complaint.

14 This is not a case that is -- although it's trying to
15 be framed that way, it's not a case about the culture of CBS'
16 alleged discrimination. It's not a case about the sexual
17 harassment allegations that have come to light recently with
18 the Me-Too movement and Charlie Rose and Matt Lauer and all of
19 the high-profile individuals who have been painted in the news
20 recently.

21 This case is limited to a particular timeframe which
22 plaintiff's counsel explained centered around Ms. Gee's alleged
23 denial of a promotion in January 2015 and the months that
24 followed.

25 It's about particular actors, who her supervisors

1 were, who her supervisors were on the particular broadcast that
2 she worked. It's about the particular business unit within the
3 CBS News organization that dealt with her complaints.

4 THE COURT: Mr. Mintz made reference to some
5 senior-level people who were involved in her decision.

6 Are these people in the more narrow division that
7 you're just referencing? Or are those people CBS News people?

8 MS. CONANAN: I think they're CBS News people,
9 your Honor. But in terms of what's alleged in the complaint
10 and what has been borne out in discovery so far, plaintiff
11 alleges that TJ Asprea, who was the producer of CBS Evening
12 News, Frank Governale, who had an operations function for that
13 broadcast, and Robert Klug, who was her manager at some point
14 when she worked on CBS News -- that those three individuals
15 were the ones that effectively removed her from the broadcast
16 and assigned her to CBS morning news. So there is a particular
17 sphere of facts that we're dealing with that relate to
18 plaintiff's specific claims.

19 She has not alleged systemic discrimination. She has
20 not alleged class claims. She has not alleged, as I mentioned
21 before, a broader culture of CBS' alleged discrimination or
22 retaliation. That is not what's at issue here.

23 Your Honor, I will submit that we don't necessarily
24 think that this information is particularly relevant, although
25 plaintiff has made the argument that he's entitled to it under

1 Second Circuit case law. The issue here is proportionate.

2 With the recent retooling of the Federal Rules of
3 Civil Procedure, there is even more of a focus on tailoring
4 discovery requests to the specific claims and needs and
5 allegations of the case with a particular focus on the cost and
6 burden of undergoing expansive discovery. So the request
7 that's written to us is extremely broad.

8 THE COURT: If you're going to raise sort of cost and
9 burden concerns, have you looked into that? Can you answer the
10 question about how many employees there are in CBS News?

11 MS. CONANAN: I don't have an exact number,
12 your Honor, but I believe it's upwards of 3,000. To explain
13 also just the structure --

14 THE COURT: Can I just ask you one other question. Is
15 there a dedicated HR office or person for the news division as
16 compared to CBS corporate?

17 MS. CONANAN: I'm not really sure, your Honor. I
18 believe that the way their HR program works is that there are
19 particular HR personnel who are dedicated to particular
20 broadcasts. So it's not as if they cover everything for CBS
21 News. There's a particular broadcast that they support as an
22 HR professional.

23 So, in order for us to delve into getting various
24 documents and information regarding prior complaints dating
25 back to 2012, we have to touch base with all of those HR

1 personnel that cover those particular broadcasts. So it's a
2 much larger endeavor for us to do that.

3 THE COURT: Put aside email, which I would assume is
4 where most of this "informal complaint" is going to be located.
5 Let's focus for a minute on formal complaints.

6 How does your client organize its complaints? So, if
7 somebody files a formal complaint in whatever format is
8 appropriate in the organization, where does it go? Where does
9 it sit? Is it logged? Is there a database? How is it
10 maintained?

11 MS. CONANAN: As far as I know, your Honor, there is
12 no centralized database for all of these complaints across the
13 different broadcasts. It also depends upon where the complaint
14 originates.

15 So, for instance, if there is a gender discrimination
16 complaint, it might be funneled to the labor employment wing of
17 CBS News, and they would handle it. But that doesn't
18 necessarily mean that other parts, for instance, of CBS
19 litigation -- they also handle separate complaints. So there
20 are various components that come into play.

21 As I said, I'm not sure on the specifics, but I don't
22 believe there is centralized database that holds all of the
23 complaints across all of the CBS News broadcasts.

24 What I can say though is that we have the ability --
25 this is something we suggested to plaintiff's counsel -- to run

a report across the various different business units to determine what kinds of gender discrimination complaints have been made, formal complaints that is, whether it's in litigation or at the EEOC stage or some other administrative stage.

We can narrow that universe that way and provide plaintiff with a substantive list as a starting point and then work with him from there to figure out what documents he's looking for.

THE COURT: I think I heard you say that you have a database, which I'm curious to hear about, but that also it's for people who have taken the step of either filing a lawsuit or filing a charge.

MS. CONANAN: Yes, your Honor.

THE COURT: Presumably that's a minority of people, and there will be a body of people who lodged a complaint with the company but maybe didn't go ahead and pursue sort of outside litigation.

So they made a formal complaint with the company that didn't result in litigation or an EEOC charge, maybe because it was unfounded, maybe because the company resolved the issue, or maybe because the complaining employee elected not to pursue it any further.

MS. CONANAN: Yes, your Honor.

THE COURT: Where is that information stored?

1 MS. CONANAN: Formal complaints. So my understanding
2 is that there is a way to obtain that information through the
3 various legal units that handle them. So, for instance, we can
4 run a report by CBS' labor and employment division, if they
5 have handled that particular complaint. So, if it's
6 discrimination, if it's retaliation, if it's harassment, CBS
7 labor employment counsel would handle that, and they have
8 access to that information.

9 THE COURT: And that's in-house labor and employment
10 counsel for CBS Corporation?

11 MS. CONANAN: Yes. CBS Corporation, your Honor. I
12 believe so.

13 On the other side, we would also have to check with
14 CBS litigation because they also are a separate business unit,
15 separate legal wing of the company, and they are also funneling
16 complaints and dealing with them. So we can also do the same
17 type of generating a report that has substantive information on
18 it about the nature of the complaint, the claims, the
19 disposition, and work from there.

20 Now, to get back to your Honor's point about informal
21 complaints, first, that brings up another issue with
22 plaintiff's request. We don't really have a sense of what that
23 means, whether it's in an email, whether it's something that's
24 made in passing and then jotted down in someone's notebook. I
25 really don't have a sense of what those documents would entail.

Without us potentially identifying custodians or doing a broader email search, assuming that those complaints are contained within the email, I'm not really sure if we can respond to plaintiff's request the way it's written. If we limit the request to formal complaints that have made their way to litigation or EEOC --

THE COURT: The people who proceed to litigation and to an EEOC charge is the very top of the pyramid. So, in my view, that is not an appropriate cap. So the thing I'm trying to figure out is I'm an employee of CBS News. I think my boss is sexually harassing me. Who do I go to.

I presumably don't go to labor and employment. I presumably don't go to litigation. I assume there is an HR person. Who do I speak to and say, hey, Mike is acting inappropriately. Who is that person? That to me is the sort of first touch if there are allegations of sex discrimination in the workplace.

MS. CONANAN: Right. So there are several formal HR channels. There is a hotline.

THE COURT: Are those recorded?

MS. CONANAN: I believe they are, your Honor. As I mentioned before, I believe the way CBS structures its HR department is that individual HR personnel are responsible for certain specific business units tied to the particular broadcast.

1 So I don't have the knowledge with me today,
2 your Honor, unfortunately, as to whether that all floats up
3 into one particular organization and where that organization
4 sits within CBS News, but my understanding is that individual
5 HR personnel handle complaints that are brought within each
6 particular broadcast.

7 THE COURT: I think there is a lot of information that
8 we need to explore here to figure out sort of how the system
9 works. I don't have a terribly clear view at this point, other
10 than people who have taken the step of pursuing charges with an
11 outside entity, whether it's courts or the EEOC. It seems to
12 me that there is still a fairly substantial lack of information
13 about, for instance, this hotline.

14 Again, it's not clear to me. You say that HR is
15 divided by business groups. I don't know if CBS News is a
16 business group, or you mentioned programming. So I don't know
17 whether or not the weekend show reports to Joe and the morning
18 news show reports to Sally. It's not clear to me how you're
19 slicing the HR responsibilities.

20 MS. CONANAN: My understanding -- I, again, recognize
21 that there is more investigation on my end to do, your Honor,
22 and I apologize for not being fully prepared for this -- is
23 that CBS News is the broadcasting organization under which
24 there are about a dozen separate broadcasts. So plaintiff
25 worked on CBS Evening News and CBS morning news. Then there

1 are about ten separate broadcasts and shows that have a
2 different producer, different director, different staff.

3 THE COURT: All part of CBS News though.

4 MS. CONANAN: All feeding up to CBS News. So there
5 are particular HR personnel that are assigned to particular
6 broadcasts. That's my understanding of how the organization
7 works at this point in terms of HR.

8 THE COURT: That's surprising to me. It doesn't mean
9 that's not the way it works, but it seems odd to me that you
10 would divide it by programming. If I'm in hair and makeup, I
11 might be on multiple shows. It's surprising to me that you
12 would be grouped by the show. That doesn't mean that's not the
13 way it works.

14 Has your client told you anything that maybe gives you
15 some insight?

16 MR. MINTZER: Not my client, your Honor. I'm sort of
17 constrained as to what I can say about this, but this is not
18 the first time I'm dealing with CBS News. So I have a little
19 bit of an understanding. I can't say it's completely current.

20 My experience with dealing with CBS News is that the
21 labor and employment counsel and this fellow by the name of
22 Mark Engstrom who I've dealt with -- I think maybe he was
23 recently promoted. He was sort of, on the legal side at least,
24 the top of the food chain for all of CBS News labor and
25 employment issues so that any kind of discrimination complaint

1 that got to the level of someone like me was involved, he was
2 dealing with it, at least before it went to outside counsel,
3 which suggests to me that there is some structure within CBS
4 News that it's not so as decentralized as counsel is
5 suggesting.

6 I want to be clear. I'm not suggesting that anyone is
7 saying anything intentionally erroneous, but I think that there
8 is a more -- it may well be that on HR level there is a point
9 person for each show, each broadcast, but that doesn't mean
10 that they don't report up to a centralized HR that covers CBS
11 News.

12 CBS News has its own president, your Honor. It has
13 its own administrative structure under it. The idea that there
14 is no way to isolate what's within HR within CBS News is not
15 within my experience and sort of farfetched.

16 The one thing I would like to add, your Honor, to
17 hopefully be constructive is in terms of the question of
18 informal complaints, we would accept any complaint that went
19 through either to HR in one of the methods that counsel is
20 describing or they have a diversity office also -- I don't know
21 if it's always been called that -- which is another avenue that
22 I think people can express complaints.

23 We are not looking, for purposes of this request, for
24 them to scour their emails to see whether anyone over the last
25 five years has said the word "discrimination" in any context.

1 If there was any confusion about that, I'm happy to clarify
2 that.

3 By informal complaints, we're trying to draw the
4 distinction precisely what your Honor was suggesting, which is
5 we're not limiting it to things that were formal litigation or
6 a charge. But on the other hand, I think it's fair to limit it
7 to things that have at least gone to some sort of central HR
8 function or some sort of diversity office or have been
9 communicated in some more regimented way and not just a random
10 email that happened to be sent at some point.

11 So I think, if that helps in getting them to clarify
12 what they have in their systems and what's more readily
13 accessible, I'm happy to put that on the table.

14 THE COURT: I'm going to order the production. I'm
15 going to use the word "formal" to include sort of
16 employee-registered complaints that were conducted through the
17 appropriate avenues that the organization has created. So it
18 would not include the watercooler talk. It would not include
19 the errant email or the sort of rumors and speculation or sort
20 of employee-to-employee complaints.

21 What I would include is any complaint that an employee
22 made regarding his or her employment at the news division that
23 that employee lodged through the avenues that are made
24 available, and whether that's through HR or labor and
25 employment or diversity or some other structure, that's what

1 needs to be produced.

2 MS. CONANAN: Your Honor, can I ask one clarifying
3 question.

4 THE COURT: Yes.

5 MS. CONANAN: You said any complaint by any employee.
6 Is that limited to gender discrimination? Retaliation?

7 THE COURT: It's certainly limited to gender
8 discrimination. Maybe it should just be limited to women
9 complaining about discrimination because they are women.

10 I don't know enough about whether or not it makes
11 sense or whether we think we're going to see gender
12 discrimination going against men, but it's going to be gender
13 discrimination and any retaliation for making a gender
14 discrimination complaint. So it certainly wouldn't cover race
15 discrimination, age discrimination, sexual orientation
16 discrimination.

17 MS. CONANAN: Thank you, your Honor.

18 MR. MINTZER: Your Honor, just to clarify, I think we
19 all understand that sexual harassment is a component of gender
20 discrimination. So, if someone is saying that their boss is
21 treating them inappropriately and it's manifesting itself in
22 sexual comments and things like that, that's part of what I
23 assume is going to be produced under this order.

24 THE COURT: That seems appropriate to me.
25 Discrimination on the basis of sex, which includes sexual

1 harassment, a sexual, hostile workplace, etc.

2 MS. CONANAN: Your Honor, one more clarifying
3 question.

4 THE COURT: Sure.

5 MS. CONANAN: I don't know if you've already made up
6 your mind, your Honor. We had suggested limiting it further to
7 Ms. Gee's position as associate director.

8 THE COURT: I don't think that's appropriate. Given
9 what I understand the defense is going to be, I think it's fair
10 for the plaintiff to be able to explore whether or not there
11 was a culture that permitted discrimination on the basis for an
12 employment decision, and I don't think it's appropriate to
13 limit it to assistant or associate directors.

14 MS. CONANAN: Thank you, your Honor.

15 THE COURT: I understand that the parties have
16 resolved everything else, but I just want to make sure we are
17 moving in the right direction.

18 So where are we on ESI generally?

19 MR. MINTZER: Well, your Honor, we had submitted a
20 copy of a status letter.

21 THE COURT: I have that here too.

22 MR. MINTZER: I think that what's in the status letter
23 is all correct. Your specific question about ESI -- I have not
24 received anything yet. The last thing that happened is that
25 there had been -- there have been a few disputes, your Honor,

1 that I had written to you to ask you for extra pages at some
2 point to put in a longer letter. Then we had some further
3 discussions about that.

4 THE COURT: Yes. I recall addressing that while on
5 vacation.

6 MR. MINTZER: I apologize, your Honor.

7 I had given them a set of proposed search terms for --
8 there was a universe of requests that my understanding of what
9 they were proposing was limiting everything to searches that
10 had Ms. Gee's name in it, and that was not something that I
11 could accept because there were several requests that would be
12 looking for relevant information that wouldn't necessarily
13 mention her, like information about comparators or things like
14 why a comparator was chosen for a job.

15 So I thought we had a hurdle where they were just
16 refusing to do anything beyond my client's name or things with
17 my client's name. I think we've gotten past that. Once I
18 understood that they were prepared to essentially look beyond
19 just her name, I gave them some specific search terms, and that
20 was on New Year's Day that I conveyed that proposal.

21 By the way, just to be clear, your Honor, that's after
22 weeks of sort of this back and forth wrangling.

23 THE COURT: Here is my concern. The plaintiff's
24 deposition is going to be in late January. You've noticed six
25 witness depositions in February, but presumably you're going to

1 want these documents before those depositions.

2 MR. MINTZER: Yes, your Honor, including my client's
3 deposition. She shouldn't have to sit for a deposition without
4 me knowing what the universe, at least -- I'm not saying that
5 every single piece of paper has to be produced, your Honor.

6 THE COURT: What's the deadline for fact discovery
7 right now?

8 MR. MINTZER: I think it's March 16.

9 MS. CONANAN: Your Honor, if I can just clarify a
10 couple things.

11 THE COURT: Sure.

12 MS. CONANAN: We originally sent plaintiff's counsel a
13 search term ESI proposal on November 20 with a list of very
14 specific search terms. We limited it to plaintiff's name but
15 also included other search terms because it is a huge universe
16 of custodians.

17 There are 11 custodians that we accepted. We accepted
18 his timeframe of January 1, 2014. We said to plaintiff's
19 counsel, if you have an alternative proposal, please provide it
20 to us, and we have had several meet-and-confer discussions.
21 We've had emails back and forth. We're in the process of
22 running hit reports for the search terms he gave us on
23 January 1 after we repeatedly asked for them.

24 So we are running those hit reports trying to figure
25 out if it's a reasonable amount of documents to review. The

1 last hit report we got turned up around 8,000 documents that we
2 told plaintiff's counsel about.

3 Now we are engaging an outside vendor in order to
4 further refine the hit reports and see if we can limit the
5 universe even further based on his proposal. So we have been
6 working very diligently.

7 THE COURT: Should I ask for a status letter in a
8 week?

9 MS. CONANAN: Sure.

10 MR. MINTZER: Yes, your Honor. Your Honor doesn't
11 care about the back-and-forth. So I'm not going to even engage
12 in it further. My concern is I want to meet the Court's
13 deadlines. I'm not at all optimistic, based on what I have to
14 date, that I'm going to be in a position to do that.

15 THE COURT: It sounds like everybody is working
16 diligently now. Let's do the following: I'll take a status
17 letter on the 19th. It can be a one-sentence joint letter that
18 says, we got it. We're all set.

19 If at that point there are still disputes about search
20 terms, I'll take three-page letters from each side, and I'll
21 hear you out. It may be that I want to either call you back
22 into court or I'll call you on the phone and we'll talk it
23 through, but I'd like to resolve this issue.

24 If I'm going to get the letter, it's going to be the
25 19th of January. We're starting to get pushed up against

1 deadlines.

2 MR. MINTZER: That's the concern, your Honor. Just to
3 emphasize also -- I want to be clear -- I'm not suggesting that
4 these lawyers are doing anything to delay this. I think that
5 they're very hard working. I think that their client is not
6 sufficiently understanding the urgency of the proceedings and
7 the realness of the deadlines here. So that's why I raised
8 this.

9 THE COURT: Well, we have a deadline now. So
10 hopefully by Wednesday you're going to get the production that
11 you've agreed to produce, and by the 19th I'm hoping I get a
12 one-sentence letter saying that the ESI protocol is set.

13 MR. MINTZER: I hope so too, your Honor.

14 THE COURT: Anything further?

15 MR. MINTZER: That's it.

16 THE COURT: Can we go off the record for one second.

17 (Pause)

18 THE COURT: Anything further from either side?

19 MR. MINTZER: No, your Honor. Thank you very much.

20 MS. CONANAN: No, your Honor. Thank you.

21 THE COURT: I'll hear from you next Friday.

22 (Adjourned)

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